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No. 104

In the Supreme Court of the United States

OCTOBER TERM, 1929

OAK WOOLEN MILLS, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 880

OAK WORSTED MILLS, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

Two distinct questions are involved in the present case:

1. The first question is whether Section 611 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 875 (R. 4), should be construed to deprive the petitioner of the right which he otherwise would have had to recover taxes which had been collected after the statutory period of limitations had expired, and if so construed, whether it is in violation of the Fifth Amendment.

2. The second question arises on the following facts: The Commissioner of Internal Revenue computed petitioner's tax for the year 1918 under the special assessment provisions of the Revenue Act

of 1918, and as a result made a refund to the petitioner. Later he decided that his previous computation was erroneous and assessed an additional sum against the petitioner to correct this error. In order to avoid possible penalties, the petitioner paid the sum so assessed. The question is whether, having paid this sum, the petitioner can recover it on the ground that the Commissioner had no authority to alter his decision after making the refund, or on the ground that the Commissioner used an illegal method in recovering the amount of the refund.

I

The United States does not oppose the petition as to the first question stated above. That question is the same as that involved in *Graham and Foster, Co-partners, etc.* v. *Goodcell, Collector,* No. 589, October Term, 1929, writ of certiorari granted March 3, 1930, and in *Percival E. Magee* v. *United States,* No. 761, October Term, 1929, writ of certiorari granted May 19, 1930, both of which are now before this Court. There is also being submitted with this case a petition for a writ of certiorari in *Taft Woolen Company* v. *United States,* No. 881, October Term, 1929, which presents questions identical with those in the instant case.

The pertinent dates in the instant case are as follows (R. 29–32):

June 16, 1919—completed return for 1918 filed.

June 21, 1922—overassessment determined under special assessment provisions, and refund made to petitioner.
March 26, 1924—reassessment under relief provisions.
April 12, 1924—claim in abatement filed.
June 16, 1924—expiration of five year period for assessment and collection of tax.
February 11, 1925—claim in abatement rejected, and second redetermination made under special assessment provisions.
September 10, 1925—tax collected.
February 15, 1928—claim for refund rejected.

The Court of Claims in a decision (R. 32, 45) reported in 36 F. (2d) 529, and 38 F. (2d) 699, decided that Section 611 of the Revenue Act of 1928 barred recovery in this case.

II

The other question raised by the petition for certiorari, we submit, does not warrant the consideration of this Court.

The petitioner argues that the Commissioner, having determined the petitioner's tax under the provisions for special assessment, could not review and set aside his determination and, therefore, that his second assessment under Sections 327 and 328 of the Revenue Act of 1918 was illegal. Although such special assessments made by the Commissioner will not be reviewed by the courts (*Williamsport Wire Rope Co.* v. *United States*, 277 U. S. 551), it

is well settled that the Commissioner may review or set aside his determinations for fraud or mistake of law or fact. It is submitted that precisely the same question was involved in *Austin Co.* v. *Commissioner*, 35 F. (2d) 910 (C. C. A. 6th), although that case arose under a later Act. The question was there decided against the taxpayer's contentions, and this Court denied certiorari, 281 U. S. vi.

The Commissioner's authority to correct his own mistakes is implied from the discretionary power given him by statute to perform the difficult calculations required for special assessment. Similar cases have held that the Commissioner's rulings and determinations may be revised by him in the absence of a final statutory settlement between the Commissioner and taxpayer. *Harriton* v. *Lucas*, Ct. of App. D. C., decided May 5, 1930, not yet reported; *Loewy & Son, Inc.* v. *Commisisoner*, 31 F. (2d) 652 (C. C. A. 2d); *Holmquist* v. *Blair*, 35 F. (2d) 10 (C. C. A. 8th); *McIlhenny* v. *Commissioner*, C. C. A. 3d, decided March 4, 1930, not yet reported. The Board of Tax Appeals has consistently upheld the Commissioner's right to review his own determinations. *Appeal of Dallas Brass & Copper Co.*, 3 B. T. A. 856; *Appeal of Warner Sugar Refining Co.*, 4 B. T. A. 5; *Appeal of First National Bank of Plattsburg, Mo.*, 4 B. T. A. 478; and *Couzens* v. *Commissioner of Internal Revenue*, 11 B. T. A. 1040, 1154.

Most of the cases cited by the petitioner (R. 5, 6) as in conflict with the decision of the Court of

Claims, are like the *Williamsport Wire Rope case,* concerned only with a review *by the courts* of some administrative act. They decide merely that the administrative decision there involved was final only in the sense that it was not subject to review by the courts.

Of the cases cited by the petitioner, *Woodworth* v. *Kales,* 26 F. (2d) 178 (C. C. A. 6th), seems to be the one which most nearly supports its position. In that case the Commissioner was denied authority to revise his calculation of the 1913 value of property. But the court said (p. 181):

> we conclude that authority to review and revise such a valuation as this for fraud, mistake, or analogous ground is reasonably to be implied from the statutes, while power thus to repudiate the former action, merely because the commissioner has changed his view (or his predecessor's) of the evidence, is not reasonably implied.

In the present case the Commissioner stated that his previous determination was erroneous. (R. 30.) If *Woodworth* v. *Kales, supra,* is in conflict with the present decision, it has been in effect overruled by the court which decided it in *Austin Co.* v. *Commissioner,* 35 F. (2d) 910, *supra.*

The petitioner also argues that it should be allowed to recover the payment made, because, it is contended, the Commissioner used an illegal method in recovering the amount of the refund. But if the reassessment was validly made, the

amount of the refund was clearly due to the United States, and the payment, once having been made by the petitioner, can not be recovered. *Austin Co.* v. *Commissioner,* 35 F. (2d) 910, certiorari denied, March 17, 1930, *supra; Champ Spring Co.* v. *United States,* 38 F. (2d) 988 (E. D. Mo.). Whether the amount thus reassessed was technically a "deficiency" under the Revenue Act of 1921, or on the other hand a claim for money paid by mistake, can make no difference after the money has in fact been paid.

The petitioner cites *Talcott* v. *United States,* 23 F. (2d) 897 (C. C. A. 9th), certiorari denied, 277 U. S. 604, and *Kelley* v. *United States,* 30 F. (2d) 193 (C. C. A. 9th), as in conflict with the decision below on this point. These cases hold respectively that in an action to recover estate taxes refunded by mistake a statutory limit on suits for collection of taxes is not applicable, and that such an action can not be brought on the equity side of the court. The opinion in the *Kelley case* states that the remedy of the Government to recover the amount of a refund erroneously paid is by an action at law. It considers only the procedural method by which an erroneous refund should be recovered by the Government. As the Government has here in fact recovered the money from the petitioner, cases relating to the method by which such a recovery can be made are beside the point.

CONCLUSION

We submit that the decision of the Court of Claims upon this second question was correct. There is no real conflict of authority on this question. We suggest that the Court limit its review to the question of the effect and validity of Section 611 of the Revenue Act of 1928.

Respectfully submitted.

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